KEE KIM CHOOI & ORS.
v.
PUBLIC PROSECUTOR.

[App. Cr. Juris. (Thomson J.) August 15, 1952]

[Ipoh — Criminal Appeal No. 25 of 1952]

Customs Enactment, 1936, ss. 99 and 114 — Uncustomed Goods — Possession — Onus of proof — Harbouring — Abetment of — Distinction between s. 99 and s. 114(ii).

Although the Customs Enactment contains certain provisions placing the onus of proof of certain matters arising in prosecutions under it on accused persons, there is nothing in it affecting the general principle of criminal law whereby in every criminal case the onus lies on the prosecution to satisfy the court of guilt of the accused person. In certain respects that task may be rendered easier by the operation of "reversal of onus" provisions but nevertheless, although it may invoke to the full the assistance of any such provisions that may be applicable the prosecution must prove its case to the satisfaction of the Court and the Court must not convict an accused person unless it is satisfied he is guilty.

There is a fundamental distinction between sections 99 and 114(ii) that may easily be overlooked. Both sections have the effect of shifting the onus of proof regarding certain facts from the prosecution on which it would otherwise lie to the accused. These facts, however, are very different. Section 99 applies to the fact that the goods are customed or uncustomed whilst section 114(ii) applies to the fact that the accused has or has not knowledge of the fact that the goods are uncustomed.

Abetment of an offence is a distinct offence from the offence itself.

Cases referred to :—

(1) *Beh Ah Teng v. Public Prosecutor* (1931-32) F.M.S.L.R. 92.

(2) *Tan Song Peng v. Public Prosecutor* (unreported) Selangor Criminal Appeal No. 12 of 1931.

(3) *Rex v. Cohen* (1951) 1 All E.R. 203.

(4) *Wang Kai Heng v. Public Prosecutor* (1951) M.L.J. 109.

(5) *Rex v. Aves* (1950) 2 All E.R. 330.

(6) *Loh Chak Wan v. Public Prosecutor* (1939) M.L.J. 84; (1937) F.M.S.L.R. 68.

(7) *Sesha Ayyar v. Vankatasubba Chetty* (1924) A.I.R. Mad. 487.

MAGISTRATE'S APPEAL.

S. K. Das for 1st and 2nd appellants.

H. T. Ong for 3rd appellant.

M. G. Neal (D.P.P.) for the respondent.

Cur. Adv. Vult.

Thomson, J. : — This is an appeal from a judgment of the Sessions Court at Parit Buntar.

On 10th November, 1951, a party of Customs Officers visited the village of Bagan Tanjong Piandang. There in the house of Kee Kim Chooi, the present 1st appellant, they found 11 bales of leaf tobacco which was thought to be of Siamese origin, and in the house of Khor See Loke, the present 2nd appellant, they found 54 bales of leaf tobacco which was also thought to be of Siamese origin. Certain circumstances which it is not necessary to set out in detail at this stage suggested some connection between both lots of tobacco so found and Khor Thing Kuan, the present 3rd appellant. The tobacco was seized and the three appellants were arrested and in due course prosecuted.

The 1st appellant was charged with knowingly harbouring uncustomed goods consisting of 11 bales of imported leaf tobacco on which import duty leviable by law had not been paid, in contravention of section 114(i) (e) of the Customs Enactment, 1936. The 2nd appellant was charged in similar terms with harbouring the leaf tobacco which had been found in his house, and the 3rd appellant was charged, firstly, with abetting the offence of harbouring alleged against the 1st appellant and, secondly, with the offence of abetting the offence of harbouring alleged against the 2nd appellant, in each case in contravention of section 119 of the Customs Enactment.

All the charges were tried together, and in the event each of the first two appellants was convicted of the offence with which he stood charged, and the 3rd appellant was convicted of both offences charged against him. Each of the first two appellants was fined $5,000, or 2 years' rigorous imprisonment in default of payment, and the 3rd appellant was fined $20,000, or 2 years' rigorous imprisonment in default of payment, on the first charge and $100,000, or 2 years' rigorous imprisonment in default of payment, on the second charge against him.

Against these convictions and sentences the appellants have all now appealed.

I will deal, in the first place, with the appeals of the first two appellants, that is to say, the two appellants on whose premises the tobacco was found.

Although the Customs Enactment contains certain provisions to which I shall refer placing the onus of proof of certain matters asising in prosecutions under it on accused persons, there is nothing in it affecting the general principle of our criminal law whereby in every criminal case the onus lies upon the prosecution to satisfy the Court of the guilt of the accused person. In certain respects that task may be rendered easier by the operation of "reversal of onus" provisions but nevertheless, although it may invoke to the full the assistance of any such provisions that may be applicable the prosecution must prove its case to the satisfaction

of the Court and the Court must not convict an accused person unless it is satisfied he is guilty.

In the present case, the prosecution had to prove three things against each of the first two appellants :—

(1) That he knowingly harboured a quantity of tobacco;
(2) That the tobacco in question was uncustomed as alleged in the charge, that is, was imported tobacco on which duty had not been paid; and
(3) That the appellant knew that the tobacco was uncustomed in the sense charged, that is, that he knew that it was imported tobacco and that the duty on it had not been paid.

As regards the first of the matters to be thus proved, the harbouring, there was never any question that the tobacco was on the premises of the appellants with their knowledge and approval. On that point the case was clearly proved.

As regards the question of whether the tobacco was uncustomed, the prosecution had to prove that it had been brought at sometime from outside Malaya and that duty had not been paid upon it, and to do so they were entitled to invoke the assistance of section 99 of the Customs Enactment which reads as follows :—

"If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovering of any penalty or penalties under this Enactment, any dispute shall arise as to whether the Customs duties have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully landed, or concerning the place whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution."

That section clearly applied for the prosecution was one for penalties under the Enactment and when the appellants claimed trial, as they did, the effect of their so doing was to put in dispute every material allegation in the charges against them including the allegations that the tobacco had been brought from outside Malaya, and that duty had not been paid on it. The effect of section 99, then, was that the proof of their sides of these disputes was upon the appellants, that is to say, they had to satisfy the Court either that the tobacco had not been brought from outside Malaya or that the proper duty had been paid upon it. I am not concerned here to discuss in general terms the quantum of evidence necessary to discharge the onus thus put upon an accused person. In the present case the position was that while the evidence might possibly be regarded as being insufficient to convince a prudent man that the tobacco came from Siam or anywhere else outside Malaya, it fell even more short of showing that it had not been brought from outside Malaya and as regards payment of duty there was not a scintilla of evidence on the point. In these circumstances, therefore, the learned President was correct in finding that the prosecution had established that the tobacco was uncustomed.

In the third place, the prosecution had to prove that each of the appellants knew that the tobacco was uncustomed in the sense that it had been imported and duty had not been paid upon it. In that connection, Counsel for the appellant placed considerable reliance on the case of *Beh Ah Teng v. Public Prosecutor*[1] and the unreported case of *Tan Song Peng v. Public Prosecutor*[2]. These cases were appeals against convictions under section 111(e) of the Customs Enactment, 1923, (which has been replaced in identical terms by section 114(i)(e) of the present Enactment) and in them it was held that the word "knowingly" must be read to govern the whole of the sub-section and that while by reason of the earlier section of the same Enactment which corresponded to section 99 of the present Enactment the burden of proving duty had been paid lay upon the accused yet the burden of proving that the accused knew that the duty had not been paid still lay on the prosecution. Both these cases were decided in 1931, and must now be read in the light of subsequent legislative changes. The Customs Enactment, 1923, became Cap. 132 in the current statute book, and in the process of consolidation section 111 became section 114. Cap. 132, however, was repealed in 1936 by the present Customs Enactment which added the following sub-section to section 114, the earlier part of which remained unaltered :—

"(ii) In any prosecution under this section any uncustomed goods shall be deemed to be uncustomed to the knowledge of the defendant unless the contrary be proved by such defendant."

The effect of that new sub-section clearly is that while knowledge that the goods were uncustomed remains an essential ingredient of the offence described by section 114(i)(e), that ingredient is now in the first instance supplied by the law itself and it is for the accused person to displace it if he can.

I pause here to emphasize a fundamental distinction between section 99 and section 114(ii) that may easily be overlooked. Both sections have the effect of shifting the onus of proof regarding certain facts from the prosecution on which it would otherwise lie to the accused. These facts, however, are very different. Section 99 applies to the fact that goods are customed or uncustomed whilst section 114(ii) applies to the fact that the accused has or has not knowledge of the fact, which logically must have been already established, that the goods are uncustomed.

Bearing that distinction in mind and accepting as I have done the learned President's finding that the appellants had failed, if indeed they ever attempted, to discharge the onus which lay upon them by reason of section 99, I proceed to consider the question of whether they discharged the onus that fell upon them

by reason of section 114(ii) of disproving knowledge. It is hardly necessary to say that to do so it was sufficient for them to prove one of two things — either that they did not know the goods were imported or that they did not know that duty had not been paid. To use the language of formal logic, the converse of a universal affirmative proposition is not a universal negative proposition but a particular negative proposition. And, of course, there is no question of the weight of the onus which lay upon the appellants being anything like the weight that ordinarily lies upon the prosecution in a criminal case. In the case of *Rex v. Cohen*[3] it was pointed out by Lord Goddard, C.J., that these customs cases are closely analogous to cases of receiving stolen goods when the evidence relied on by the prosecution is possession of goods recently stolen, and in the case of *Wang Kia Heng v. Public Prosecutor*[4], the Court of Appeal held that the proper test to be applied in cases of that kind is that laid down by Lord Goddard in *Rex v. Aves*[5] when he said :—

"Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt whether he knew the property was stolen, they should be told that the case has not been proved, and, therefore, the verdict should be Not Guilty."

The same point was put slightly differently by Sir Samuel Thomas, C.J., in the case of *Loh Chak Wan v. Public Prosecutor*[6] a case under section 114(h) of the present Customs Enactment, where he said :—

"Where the duty of giving an explanation is cast upon a defendant, and an explanation is given, which is consistent with innocence, the Court must consider whether it might reasonably be true although not convinced of its truth."

It seems to me that in the present case the learned President has overlooked the distinction I have indicated between section 99 and section 114(ii) for while in his Grounds of Judgment he has dealt with the question of whether or not the tobacco came from Siam, on which in my opinion he arrived at a correct conclusion, he nowhere deals with the question of knowledge, and it seems to me on a consideration of the evidence that had he applied his mind to that question he would have come to the conclusion that the story told by the appellants might reasonably be true and thus have been left in doubt as to whether they had in fact knowledge that duty had not been paid at any time during the duration of the harbouring, that is to say, at any time prior to the arrival of the Customs Officers and the seizure by them of the tobacco. Their evidence was, and this was not contradicted, that the tobacco had been brought to them for storage by the 3rd appellant. There was no evidence of any attempt to conceal it in anyway and, although there were slight discrepancies between the story they told to the Customs Officers at the time of the raid and the evidence they gave in Court, these discrepancies, if they were not the result of innocent mistake, no doubt resulted from a desire to shield the 3rd appellant and by no means conclusively indicated that any guilty knowledge had existed on their part prior to the Customs raid.

In the circumstances, and in the absence of any direct finding of fact by the learned President, I am compelled to quash the convictions.

I now turn to the case of the 3rd appellant.

The 3rd appellant was charged with abetment of the offences charged against the 1st and 2nd appellants in contravention of section 119 of the Customs Enactment.

It does not follow, however, as was submitted by his Counsel, that if the convictions of the first two appellants cannot stand his conviction must necessarily fall to the ground. Section 119 makes it clear that abetment of a customs offence is abetment within the meaning of the Penal Code. It is therefore to be considered in the light of section 108 of the Code the relevant portions of which read as follows :—

"A person abets an offence who abets . . . the commission of an act which would be an offence, if committed . . . . with the same intention or knowledge as that of the abettor.

Explanation 3. — It is not necessary that the person abetted . . . should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge."

There is no question, indeed it is admitted, that the 3rd appellant instigated the other two appellants to harbour the tobacco, nor can there be any doubt that the tobacco was uncustomed. If, however, the 3rd appellant knew that it was uncustomed, that is to say, if he knew that it was brought from outside Malaya and that duty had not been paid upon it, then it clearly follows from the provision of the Penal Code which has been quoted that he was guilty of the offence of abetment even although it has been held that the first two appellants were not guilty of the substantive offence charged against them by reason of want of guilty knowledge.

Abetment of an offence, however, is a distinct offence from the offence itself (see *Sesha Ayyar v. Venkatasubba Chetty*[5]). Abetment of a Penal Code offence is a distinct offence punishable under section 109 of the Code and similarly abetment of a customs offence is a distinct offence punishable under section 119 of the Customs Enactment. It follows, therefore, that in attempting to make out an abetment of a

Customs offence the prosecution are not in a position to make use of sub-section (ii) of section 114 for in terms that sub-section only applies to prosecutions under the first sub-section of the same section. So it follows in the case of abetment that so far as knowledge is concerned the prosecution can only make use of the ordinary mechanism of proof, that is to say, the production of satisfactory evidence, and if the matter went no further in the present case I would be compelled to say that at the conclusion of the prosecution case no case against the accused had been made out "which if unrebutted would warrant his conviction" and the accused was therefore entitled to be acquitted by reason of section 173(f) of the Criminal Procedure Code.

Had the Legislature not intervened, I should have been prepared to disregard the judgment of Burton, J., in *Beh Ah Teng's*[1] case and follow without hesitation the law thus stated by Lord Goddard in *Cohen's*[3] case :—

> "The prosecution having proved that the accused was in possession of dutiable goods in such circumstances as would entitle a court to find that he was consciously in possession of them and the accused having failed to prove that the duty had in fact been paid, there is then, in the opinion of the court, an onus on him to give some explanation of his possession from which a jury might infer that he did not know that duty had not been paid. It must be for him to give this explanation because the facts relating thereto must be exclusively within his knowledge."

In other words, in terms of the local law I should have held that the onus of proving lack of knowledge passed to the accused by reason of section 106 of the Evidence Ordinance. The Legislature, however, has intervened in a particular way and I am bound I think to give effect to that intervention. It is true that in *Beh Ah Teng's* case no attempt was apparently made by Mr. (as he then was) H. C. Willan who appeared for the prosecution to invoke the assistance of section 106 of the Evidence Ordinance nor was the effect of that section considered by the learned Judge who applied his mind exclusively to section 100 of the then Customs Enactment (the present section 99). What I am concerned with, however, is the consequent action of the Legislature. It might have been said : "section 106 of the Evidence Ordinance has been overlooked *per incuriam*. We will leave the statute unamended and the point can be made clear on the next occasion it is tested in Court". Or again it might have been said : "the Court has in effect held that section 106 of the Evidence Ordinance has no application to customs cases. We will make it clear that it is our intention that it should apply in all such cases by an amendment of the statute." Had this attitude been adopted one would have expected to find some amendment of general application, presumably in the way of some amendment to section 99. The Legislature, however, did neither of these things. It did not refrain from amending that statute nor did it enact an amendment of general application. What it did do was to enact the present sub-section (ii) of section 114 which as has been pointed out only applies, and its terms are very clear, to prosecutions under the first sub-section of the same section. And here I would point out in parenthesis that although sub-section (i) of section 114 closely follows the wording of section 186 of the English Customs Consolidation Act, 1876, the wording of sub-section (ii) does not appear anywhere in that Act, and that section 99 of the Customs Enactment is to all intents and purposes the same as section 259 of the English Act.

From this to my mind two inferences as to the mind of the Legislature are unvoidable. The first is that it was thought that under the local Customs law prior to the enactment of sub-section (ii) of section 114 there was no onus on an accused person to prove lack of knowledge that goods with which he was concerned were uncustomed. The second is that it was the intention to place such an onus upon an accused person but only to do so in the case of alleged offences under section 114(i).

The matter, however, does not rest there. In the law as I have stated it there is implicit a proposition which to my mind though unavoidable is absurd. Under section 114(i)(e) it is an offence knowingly to harbour uncustomed goods but it is also an offence knowingly to cause uncustomed goods to be harboured. It follows, therefore, that if A places uncustomed goods in B's premises for safe keeping and B voluntarily receives and does keep them, then A's action can be described either as causing B to harbour them or as abetting the harbouring of them by B. If the first description is applied then A commits an offence under section 114(i)(e) and the prosecution are entitled to invoke the assistance of section 114(ii). If, however, the second description be applied, then A is guilty of an offence under section 119 and the prosecution are not entitled to invoke the aid of section 114(ii). Looking at the matter technically it thus follows that A's conviction may depend not on the strength of the case against him but on which of two words is arbitrarily chosen to describe its effects. To my mind it would be a great misfortune if technicality was to be carried to this length where an accused person's conviction depended not upon his guilt but on a mere question of usage of the English language which might well be accidental.

The truth is that the 3rd appellant should have been charged under section 114(i)(e) with causing tobacco to be harboured by the other two appellants or, if he was not so charged originally, the charge should have been amended to that effect by the learned President in the course of the trial. The very fact that the learned President failed thus to amend the charge fortifies me in the opinion I have already stated that he overlooked the distinction between section 99 and section 114(ii), and this oversight in my opinion amounted to a substantial misdirection. In the case of the first two appellants this misdirection has led me to quash their convictions because in their cases I have not the slightest doubt on the recorded evidence that had the learned President directed himself correctly he would have been bound to acquit them. As regards the third appellant, however, the state of the evidence is not such as to enable me to say with any certainty at what conclusion the learned President would have arrived had he directed himself correctly. In his case, therefore, while I am compelled to quash his conviction for reasons which will be abundantly clear from what I have said I order that he be retried on a charge framed under section 114(i)(e).

Conviction of 1st and 2nd appellants quashed — Retrial of 3rd appellant ordered.

In re LEE SIEW KOW, Deceased YEO SIEW NEO (w) v. GAN ENG NEO (w) & ORS.

[Court of Appeal (Sir Charles Murray-Aynsley, C.J. (Singapore), Mathew, C.J. (F.M.) and Brown, J.) July, 15, 1952]

[Singapore — Civil Appeal No. 13 of 1952]

Chinese marriage — Secondary wife — Kept mistress — Intention to form a permanent union.

This was an appeal from a judgment of Rogers, J. rejecting the appellant's claim that she was tsip or secondary wife of the deceased. It was argued by counsel for the appellant that the judgment in Re Lee Choon Guan decd.,(1) relied upon by the learned trial Judge, was erroneous in that it decided that recognition by the family of the alleged husband was not merely evidentiary but essential to the validity of a secondary marriage. In the present case there was admittedly no such recognition, but the learned trial Judge did not base his decision merely on that ground but on the evidence generally.

Held, that on the evidence the learned trial Judge was justified in deciding that the appellant was not a tsip.

Per Mathew, C.J. (F.M.): An agreement to keep a woman is not equivalent to an agreement to marry her; strong evidence that a woman is a kept mistress negatives the inference that a marriage has taken place.

Per Brown, J.: In order to establish a claim to be a secondary wife a consensual marriage must be proved. The means by which the mutual consent to marry is to be proved is a matter of evidence in each case.

Er Gek Cheng v. Ho Ying Seng(3) followed.

Cases referred to :—

(1) *Re Lee Choon Guan, decd.* (1935) M.L.J. 78.

(2) *Tan Ah Bee v. Foo Koon Thye* (1947) M.L.J. 169.

(3) *Er Gek Cheng v. Ho Ying Seng* (1949) M.L.J. 171.

COURT OF APPEAL.

N. A. Mallal for the appellant.

K. A. Seth and R. H. Green for the respondents.

Cur. Adv. Vult.

Sir Charles Murray-Aynsley, C.J., (Singapore): — In this case appellant had claimed to be a *tsip* of the deceased. At the hearing the learned Judge found that she was not. The appeal raised questions of law and fact. In his judgment the learned Judge cited and relied upon the judgment of Terrell, J., in the case of *Re Lee Choon Guan, decd.*(1). It was contended that this judgment was erroneous in that it decided that recognition by the family of the alleged husband was not merely evidentiary but essential to the validity of a secondary marriage. It is true that the perusal of the judgment might give that impression, but I do not think that the learned Judge acted on that assumption. In the present case there was admittedly no such recognition but the learned Judge did not base his decision merely on that ground but on the evidence generally. I do not think, therefore, that the judgment was based upon an erroneous view of the law.

Objection was also taken to a quotation, referred to with approval, from a judgment of Carey, J., in the case of *Tan Ah Bee v. Foo Koon Thye*(2), which reads as follows :—

"When one appreciates that a secondary wife may be acquired with so little formality and when acquired, she and her children, if any, in the event of an intestacy, share in the estate of the late husband, there is, if marriage is to remain a recognized honourable estate, an urgent necessity to ensure that a mistress or kept woman and her children, if any, should not step in to minimize the shares on distribution of the legal wives and children of the deceased."

I regard that passage as unfortunate. There is no sanctity about a Chinese marriage whether in the case of a *tsai* or a *tsip*. The Chinese idea of any marriage is purely secular, a matter of contract. In any case it is too late to object to secondary marriages, and if one decides in favour of one side in any case, it is usually to the detriment of the other. I think that all that passage really means is that one should not let sympathy overlook the weight of evidence. This is true but trite.

I do not think that the judgment is based on an erroneous view of the law. Therefore, the appeal must be regarded as an appeal of fact.